EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/51 Reasons for selecting pregnant employee for redundancy insufficient (DK)

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Facts

It follows from the Danish Act on Equal Treatment of Men and Women that an employer is prohibited from dismissing an employee on grounds of pregnancy. It further follows from the Act that if an employer dismisses a pregnant employee, the employer must prove that the pregnancy had nothing to do with this decision. In this case, there were several reasons why the pregnant employee was dismissed, but that did not mean that the employer was able to discharge the burden of proof.

The case concerned a metal worker who was given notice of termination while she was pregnant. She had worked at the company, which was a small metal company with only five employees, for ten years.

Since the employee was pregnant at the time of the dismissal, she believed that her pregnancy was the reason for the dismissal. She therefore turned to her trade union, which issued proceedings against the employer. The trade union claimed compensation of 15 months' pay.

The company explained that the reason for the dismissal was the company's financial problems. When a major order did not go through as expected, the company had to dismiss one of its employees. The employer chose the pregnant employee because she would not be able to carry out the work performed by her colleagues without retraining. Moreover, there had been cooperation issues and a situation where the employee had left the workplace without permission.

It was undisputed that the employee was pregnant at the time of the dismissal and that the employer knew she was pregnant.

The district court found in favour of the employee and ordered the employer to pay compensation of 12 months' pay. It was a decisive factor for the district court that the employee had never received a warning or reprimand in relation to the alleged cooperation issues.

Judgment

On appeal, the Danish Eastern High Court did not find that the employer had succeeded in disproving that the employee had been dismissed because of, or partly because of, her pregnancy.

The High Court agreed that the company's financial problems made it necessary to reduce the number of employees. However, since there were four other employees in the company, the employer – in order to satisfy the burden of proof – had to demonstrate what reasons, other than pregnancy, made it necessary to dismiss the pregnant employee rather than one of the four other employees.

When assessing the employer's reasons for dismissing the pregnant employee, one factor was that the cooperation issues had not resulted in a warning or reprimand being issued to the employee. Another factor was that the High Court found that the pregnant employee would have been able to carry out the work performed by her colleagues after a certain amount of retraining – and on comparing the pregnant employee's qualifications with the other employees' qualifications, the High Court did not find it had been necessary to dismiss the pregnant employee in preference to one of her colleagues.

Contrary to the district court, the High Court awarded the employee compensation equal to

nine months' pay. The High Court's decision to reduce the compensation awarded by the district court by the equivalent of three months' was based on the employee's length of service and the company's financial problems, which shortly after the dismissal of the pregnant employee resulted in three additional dismissals.

Commentary

The judgment reinforces the principle that if a pregnant employee is dismissed, the employer must prove that the dismissal is not based on the employee's pregnancy in whole or in part.

The judgment further shows that – independently of the circumstances of each individual case – it may be a challenge for the employer to discharge the burden of proof if the employee is able to carry out other duties and responsibilities within the same technical area in the department where the employee works. In such a case, it is practically impossible to prove it was necessary to dismiss a employee who enjoys special protection under the Danish Act on Equal Treatment of Men and Women. The judgment also demonstrates the importance of issuing written warnings if an employer is dissatisfied with an employee's work or behaviour.

As regards the size of the compensation, it is also interesting that the High Court reduced it from 12 to 9 months' pay based on the employee's length of service and the company's financial problems. The fact that the company had to dismiss three additional employees shortly after dismissing the pregnant employee shows that it was in fact having financial problems, and since it was a small company there were few employees to choose from.

In this case, the employee was awarded compensation for unfair dismissal. The Danish Act on Equal Treatment of Men and Women does provide for the opportunity of reinstatement, but in this case the employee did not claim reinstatement.

Comments from other jurisdictions

Austria (Martin Risak): This case would definitely have resulted in a different ruling in Austria as a result of the special protection against dismissal granted to pregnant workers. A female employee cannot be given notice during pregnancy without the consent of the court. The condition is that the pregnancy was known to the employer at the time of giving notice, or it was notified of the pregnancy within five days of notice being given. The court can only assent if the employment relationship cannot be maintained without losses to the establishment because of downsizing or (intended) closing down of the establishment or closing down of individual departments. In the absence of consent by the court, a dismissal is void. It is long-established court practice however that a pregnant worker may accept termination and ask for compensation. The amount of the compensation will be the equivalent of the employee's pay

between the termination and the moment when the employee could have been dismissed without the consent of the court, i.e. several months after the birth plus the notice period.

Germany (Klaus Thönißen): Even though the outcome is the same as under German law, the reasoning would be different and this case would be unlikely to have ended up before a Labour Court. Section 9 of the Maternity Protection Act ("Mutterschutzgesetz") provides the rule under which an employer is precluded from dismissing a pregnant worker, save in exceptional cases. This rule is in accordance with the Directive 92/85. The Directive states in Article 10:

"Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent."

In addition, Germany is one of the member states in which employers are only allowed to dismiss a pregnant employee after having received written consent from the competent authority. Without that consent a German employer cannot lawfully dismiss a pregnant employee. Under German law the competent authority will consider whether there are exceptional circumstances and only give its written consent in situations where it would be utterly untenable for the employer to be bound to the particular employment contract with a pregnant employee. In 1991 the German Constitutional Court ("Bundesverfassungsgericht") stated that, even when a company is facing a very difficult economic situation, a pregnant employee should keep her job where at all possible.

My view is that the company's financial problems in this case, which appear to have forced the employer to dismiss (initially, at least) only one employee, would not constitute exceptional circumstances under German employment law. The competent authority would not have given its written consent in such a case and therefore the case would probably not have come to court. If an employer wishes to challenge the competent authority's refusal, it can file a complaint with the Administrative Court ("Verwaltungsgericht").

The reason why a German employer cannot normally dismiss a pregnant employee based on financial hardship, is that the financial burden on the employer of retaining a pregnant employee is not particularly great. In Germany an employer has to pay the employees 'salary' (i.e. maternity allowances) for eight weeks after the employee has given birth (12 weeks in cases of premature childbirth). After that – when the employee is on maternity leave – the employer is not obliged to pay anything at all and therefore the employee is not a financial

burden on the employer.

The Netherlands (Peter Vas Nunes): The contributor of this case report seems to present this judgment as evidence that Danish law goes a long way to protect pregnant employees against dismissal. However, I continue to wonder (see EELC 2011/41) whether Danish law goes far enough, given Article 10(1) of the Maternity Directive 92/85, which provides:

"Member States shall take the necessary measures to prohibit the dismissal of workers [...] during the period from the beginning of their pregnancy to the end of the maternity leave [...], save in exeptional cases not connected with their condition [...]" [emphases added].

It would seem that the High Court in this matter would have accepted as valid and fair the dismissal of this pregnant employee had the employer been able to demonstrate that there were good business reasons ("cooperation issues" and a need for retraining) for selecting her for redundancy rather than any of her colleagues. This strikes me as a rather broad interpretation of "exceptional cases".

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